



Storm Water Phase II Proposed Rule

Who's Covered? Designation and Waivers of Regulated Small MS4s

This fact sheet is based on the Storm Water Phase II Proposed Rule. Therefore, the information provided herein is subject to change upon publication of the final Phase II rule in November 1999. A revised series of fact sheets will be provided at that time. A comprehensive list of the current fact sheets is in the text box at left.

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Who Would Be Affected by the Proposed Phase II Small MS4 Program?

The Storm Water Phase II Proposed Rule would apply to public owners or operators of *regulated small* municipal separate storm sewer systems (MS4s), which are determined by specific criteria as discussed in this fact sheet. To aid in determining whether an MS4 would meet these criteria, this fact sheet reviews the definition of an MS4 and distinguishes between small, medium, and large MS4s. Conditions under which a small MS4 may be designated as a *regulated* small MS4, as well as the conditions for a waiver from the Phase II program requirements, are outlined. This fact sheet also attempts to clarify possible implementation issues related to determining one's status as an owner or operator of a regulated Phase II small MS4.

What Is a Municipal Separate Storm Sewer System (MS4)?

What constitutes an MS4 is often misinterpreted and misunderstood. An MS4 is not meant to refer to municipally-owned storm sewer systems only, but rather it is a term of art with a much broader application. Owners or operators of MS4s, in addition to local jurisdictions, could be State and Federal departments of transportation, universities, local sewer districts, hospitals, military bases, and prisons. Also, an MS4 is not necessarily merely a system of underground pipes. It also can include roads with drainage systems, gutters, and ditches. The existing regulatory definition of an MS4 is provided below.

According to 40 CFR 122.26(b)(8), "*municipal separate storm sewer* means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

- (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created to or pursuant to State law)...including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the Clean Water Act that discharges into waters of the United States.
- (ii) Designed or used for collecting or conveying storm water;
- (iii) Which is not a combined sewer; and
- (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2."

The Phase II Proposed Rule would add Federal systems, such as military bases and prisons, to the existing regulatory definition of an MS4 by changing paragraph 122.26(b)(8)(i) (see above) to read: "Owned or operated by the *United States*, a State, city, town, borough, county...."

What is a Small, Medium, or Large MS4?

- ❑ EPA’s national storm water program labels MS4s as either “small,” “medium,” or “large” for the purposes of regulation.
- ❑ A **small MS4** is any MS4 that is not already covered by the existing Phase I storm water program.
- ❑ The Phase I storm water program covers *medium* and *large* MS4s. Phase I MS4s were automatically designated nationwide as **medium MS4s** if the systems served a population between 100,000 - 249,999 people or as **large MS4s** if the systems served a population of 250,000 or more. Many MS4s that serve a population below 100,000, however, have been individually brought into the Phase I program by NPDES permitting authorities and are considered medium or large MS4s, and *not* small MS4s, regardless of the size of the population served.

❑ Urbanized Areas

An **urbanized area (UA)** is a land area comprising one or more places – central place(s) – and the adjacent densely settled surrounding area – urban fringe – that together have a residential population of at least 50,000 and an overall population density of at least 1,000 people per square mile. It is a calculation used by the Bureau of the Census to determine the geographic boundaries of the most heavily developed and dense urban areas.

At the time of permit issuance (not to exceed 3 years and 90 days after publication of the final Phase II rule), UA calculations based on the 2000 Census are scheduled to be completed and the regulated universe then would be based on these new calculations. For more information on UAs, see Fact Sheet 2.2.

Would All Small MS4s Be Covered by the Phase II Proposed Rule?

No. The universe of small MS4s is quite large since it includes every MS4 except for the approximately 900 medium and large MS4s already regulated under the Phase I storm water program. Only a select sub-set of small MS4s, referred to as **regulated small MS4s**, would be covered by the Phase II Proposed Rule, either through automatic nationwide designation or designation on a case-by-case basis by the NPDES permitting authority.

❑ Appendix 6 to the Preamble of the Phase II Proposed Rule

Appendix 6 is a listing of all incorporated places and counties that are fully or partially located within a UA according to the 1990 Census. The list is meant to serve as a general geographic reference for owners or operators of small MS4s that are trying to determine their status in regard to the Phase II criterion (located within a UA) for automatic designation. Appendix 6 can be obtained from the EPA Office of Wastewater Management or downloaded from the OWM web site. See Fact Sheet 2.2 for more information on UAs and how to determine potential coverage under the Phase II program.

How Would A Small MS4 Be Designated as a Regulated Small MS4?

A small MS4 could be designated as a *regulated* small MS4 in one of three ways:

❶ Automatic Nationwide Designation

The Phase II Proposed Rule would require nationwide coverage of all owners or operators of small MS4s that are located within the boundaries of a Bureau of the Census-defined “urbanized area” (UA) based on the latest decennial Census. Once a small MS4 is designated into the program based on the UA boundaries, it would not be waived from the program if in a subsequent UA calculation the small MS4 is no longer within the UA boundaries. An automatically designated small MS4 would remain regulated unless, or until, it meets the criteria for a waiver.

It is important to note that Appendix 6 is *not* a listing of all the Phase II regulated small MS4s. Because a Phase II regulated small MS4 would be any small MS4 located within the boundaries of a UA, providing an accurate nationwide list of these entities is not feasible at this time.

In addition, Appendix 6 does not include incorporated places and counties already permitted under Phase I. Any small MS4s located in a Phase I incorporated place or in the UA portion of a Phase I county (e.g., a Federal prison), however, would be covered under the Phase II program. This is particularly important to note in the case of Federally owned or operated MS4s since they were not covered nationally under Phase I and may exist, unpermitted, in Phase I areas. A list of Phase I counties and incorporated places can be obtained from the EPA Office of Wastewater Management or downloaded from the OWM web site.

Appendix 6 also does not include minor civil divisions (towns and townships). A list of the minor civil divisions that are functioning governmental entities and are entirely or partially located within a UA can be obtained from the EPA Office of Wastewater Management or downloaded from the OWM web site.

② Potential Designation by the NPDES Permitting Authority (Required Evaluation)

Owners or operators of small MS4s located outside of a UA could be designated as regulated small MS4s if the NPDES permitting authority determines that the discharges from the small MS4 cause, or have the potential to cause, an adverse impact on water quality. The Phase II Proposed Rule would require the NPDES permitting authority to develop a set of designation criteria and apply them, *at a minimum*, to all small MS4s located outside of a UA serving an area with a population of at least 10,000 and a population density of at least 1,000 people per square mile.

❑ Designation Criteria

EPA recommends that the NPDES permitting authority use a balanced consideration of the following designation criteria on a watershed or other local basis:

- ✓ Discharge to sensitive waters;
- ✓ High population density;
- ✓ High growth or growth potential;
- ✓ Contiguity to a UA;
- ✓ Significant contributor of pollutants to waters of the United States; and
- ✓ Ineffective control of water quality concerns by other programs.

❑ Appendix 7 to the Preamble of the Phase II Proposed Rule

Appendix 7 is a listing of all incorporated places and counties, located outside of a UA, that have a population of at least 10,000 and a population density of at least 1,000 people per square mile. As with Appendix 6, the list is meant to serve as a geographic reference only. Owners or operators of small MS4s located within a listed area should be aware that they could be examined by their NPDES permitting authority for potential designation into the Phase II program. Appendix 7 can be obtained from the EPA Office of Wastewater Management or downloaded from the OWM web site.

It is important to note that Appendix 7 is *not* a complete listing of all potentially designated small MS4s because the NPDES permitting authorities may require any small MS4 that is contributing pollutants to waters of the U.S. to be permitted.

❑ Deadline for Designation

The NPDES permitting authority would be required to designate small MS4s meeting the designation criteria within 3 years and 90 days of publication of the final rule, or within 5 years if a watershed plan is in place.

③ Potential Designation by the NPDES Permitting Authority

Under the proposed rule, the NPDES permitting authority would be required to designate any small MS4 located outside of a UA that contributes substantially to the storm water pollutant loadings of a *physically interconnected* MS4 regulated by the NPDES storm water program. The proposed rule does not set a deadline for designation of small MS4s meeting this criterion.

Physically interconnected means that one MS4 is connected to a second MS4 in such a way that it allows for *direct* discharges into the second system.

Does the Proposal Provide a Waiver from the Phase II Permit/Program Requirements?

Yes, if a regulated small MS4's discharges have been determined to not cause, or have the potential to cause, water quality impairment. A waiver option would be available to owners or operators of automatically designated small MS4s where:

- (1) the jurisdiction served by the system is less than 1,000 people;
- (2) the system is not contributing substantially to the storm water pollutant loadings of a physically interconnected regulated MS4; and
- (3) the owner or operator can certify that storm water controls are not needed based on “total maximum daily loads” (TMDLs) assessments or a comprehensive watershed plan that includes the equivalents of TMDLs.

TMDLs are water quality assessments that determine the source or sources of pollutants of concern for a particular waterbody, consider the maximum amount of pollutants the waterbody can assimilate, and then allocate to each source a set level of pollutants that it is allowed to discharge (i.e., a “wasteload allocation”). Small MS4s that are not given a wasteload allocation would meet the third criterion above.

To obtain a waiver, the owner or operator would be responsible for certifying on a form, provided by the NPDES permitting authority, that the three waiver criteria have been met and therefore implementation of storm water controls is not necessary. Since the waiver is indefinite, the owner or operator would not need to recertify every 5 years.

Could Multiple Jurisdictions in the Same Urbanized Area Be Designated?

Yes. Since the proposed rule would provide automatic coverage of all small MS4s within a UA, the result would likely be coverage of several governments and agencies with multiple, perhaps overlapping, jurisdictions. For example, a city that is located within a UA and operates its own small MS4 would be designated alongside the State's department of transportation (DOT) and the county's DOT if the State and county own or operate roads that are within the borders of the city. All three entities would be responsible for developing a storm water management program for the portion of their respective MS4s within the city limits. In such a case, the permittees would be strongly encouraged to work together to form a unified storm water management program.

Who Would Be Responsible if the Small MS4 Owner/Operator Lacks the Necessary Legal Authority?

Some regulated small MS4s may lack the necessary legal authority to implement one or more of the required minimum control measures that comprise the proposed Phase II storm water management program. For example, a local government that is a small MS4 operator may be in a State that does not have an enabling statute that allows local regulatory control of construction site runoff into the sewer system. In such cases, the NPDES permitting authority would be responsible for implementation of the particular minimum control measure. Another example is a State DOT that may not have the legal authority to require and enforce controls on illicit discharges into its system. Since the regulated portion of a DOT system would likely run through the area of, or connect to, another regulated small MS4, the DOT would be encouraged to work with the neighboring regulated small MS4. As co-permittees, they could form a shared storm water management program in which each permittee is responsible for activities that are within their individual legal authorities and abilities.

For Additional Information

Contact

- ☞ U.S. EPA Office of Wastewater Management
 - Phone : 202 260-5816
 - E-mail: SW2@epa.gov
 - Internet: www.epa.gov/owm/sw2.htm

Reference Documents

- ☞ Storm Water Phase II Proposed Rule Fact Sheet Series.
 - Contact the U.S. EPA Water Resource Center at 202 260-7786 or at waterpubs@epa.gov
 - Internet: www.epa.gov/owm/sw2.htm
- ☞ Storm Water Phase II Proposed Rule, published on Jan. 9, 1998 in the *Federal Register* (63 FR 1536).
 - Internet: www.epa.gov/owm/sw2.htm